Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

October Term, 1971
No. 71-583

NEVILLE M. TUCKER,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO THE UNITED STATES' MEMORANDUM IN OPPOSITION

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May it please the Court:

After reviewing Respondent's Memorandum in Opposition to the Petition for a Writ of Certiorari, Petitioner is constrained to reply to the Respondent's misleading and inaccurate statements. First, Respondent, by innuendo and inference, would have this Court believe that Petitioner lied to his probation officer when he "represented that he had timely requested" an extension (R. 8a[1]; Mem. U.S.2). Petitioner, in fact, on April 14, 1971 submitted an "Application for Extension of Time to File" to the Internal Revenue

[1]"R." references are to the record appendix filed in the Sixth Circuit Court of Appeals.

Service (R. 9a, 11a). Second, Respondent submits, for this Court's consideration, allegations which were neither found in the Probation Petition of May 18, 1971, nor presented to the District Court at the Hearings of May 28. 1971, or June 24, 1971 (R. 8a, 34a-56a). Neither the Respondent nor the courts have ever made the question of Petitioner's punctuality in submitting his monthly probation reports an issue in this case. Moreover, Petitioner's veracity in his discussions with the probation officer has never been an issue in this case.

Third, the Respondent alleges that the sufficiency of the evidence supporting revocation of Petitioner's probation is not an issue in the case. While Petitioner's appeal to the Sixth Circuit Court of Appeals, was pending, the Internal Revenue Service acted upon Petitioner's completed request for extension of time, giving him until June 15, 1971, to file his tax return. At the time of oral argument on appeal, Petitioner's counsel advised the Sixth Circuit Court of Appeals of this newly discovered evidence, namely, the extension having been granted by the Internal Revenue Service. On June 11, 1971, while the appeal was still pending, Petitioner filed a motion asking the District Court to request the Sixth Circuit to remand the case to the District Court in order that these newly discovered facts could be considered by the District Court. On June 15, 1971, the District Court granted Petitioner's motion for a hearing and set the hearing for June 24, 1971. The Sixth Circuit, prior to this

hearing, rendered its decision on June 18, 1971, and stated that it was not necessary for it to remand in order for the District Court to consider the newly discovered evidence, stating that the Circuit Court was not required to consider and determine questions not presented to the District Court (R. 33a).

On June 24, 1971, the District Court Judge had before him motions which, in fact and substance, sought a new hearing or new trial for the Petitioner based upon newly discovered evidence which had occurred subsequent to the Court's earlier decision revoking Petitioner's probation. Rule 33 of the Federal Rules of Criminal Procedure states:

> "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after the final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. * * * "

As stated in Rule 33, a motion for a new trial, based on the ground of newly discovered evidence, may be made only before or within two years after final judgment, but if an appeal is pending, the Court may grant the motion only on remand of the case. Petitioner followed the precise procedure required by Rule 33 by requesting the District Court to have the Sixth Circuit Court of Appeals remand the case and to grant him a new hearing based upon the newly discovered evidence.

No one can seriously question the District Court's authority to grant a new hearing based on newly discovered evidence and to reinstate the Petitioner's probation. The Sixth Circuit Court of Appeals recognized as much on page 5 of its Opinion in the original appeal of the *United States of America* v. *Neville M. Tucker,* decided June 18, 1971 (R. 33a).

Petitioner respectfully submits that the precise question involved in this case is whether there was, or is now, evidence to support the revocation of probation and sentence of imprisonment. For the reasons cited herein and in the Petition for Writ of Certiorari, Certiorari should be granted and the judgment reversed.

Respectfully submitted,

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